IN THE COUNTY COURT OF VICTORIA

Revised
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AT MELBOURNE
CRIMINAL JURISDICTION

CR 17-02103

VICTORIAN GOVERNMENT REPORTING SERVICE

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DIRECTOR OF PUBLIC PROSECUTIONS

v

FIDAA AHMAD

JUDGE:	HIS HONOUR JUDGE WRAIGHT
WHERE HELD:	Melbourne
DATE OF HEARING:	13 July 2018
DATE OF SENTENCE:	31 July 2018
CASE MAY BE CITED AS:	DPP v Ahmad
MEDIUM NEUTRAL CITATION:	[2018] VCC 1174

REASONS FOR SENTENCE

Subject: Criminal Law - Sentence

Catchwords: Guilty plea – three charges of obtain financial advantage by deception – three charges of using a false document – two charges of making a false document – one charge of possess a drug of dependence

Legislation Cited: *Crimes Act* 1958 (Vic), *Drugs, Poisons and Controlled Substances Act* 1981 (Vic)

Cases Cited: *DPP v Kose* [2006] VSCA 119, *DPP v Nguyen* [2014] VCC 125, *R v Tran* [2014] VSCA 85, *R v Glenn* [2005] VSCA 31

Sentence: Total effective sentence of 12 months imprisonment wholly suspended for a period of two year - community correction order for a period of two years, 150 hours community work, supervision, program to reduce the risk of reoffending - $250 fine

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APPEARANCES:	Counsel	Solicitors
For the Director of Public	Mr S Devlin	Office of Public

Prosecutions		Prosecutions
For the Accused	Mr J Anderson (Plea)	Chiodo Madafferi Solicitors
	Ms T Fleming (Sentence)	

HIS HONOUR:

Introduction

1 Fidaa Ahmad, you have pleaded guilty to the following charges:

- Three charges of obtain financial advantage by deception contrary to s 82(1) of the *Crimes Act* 1958, which carries a maximum penalty of 10 years imprisonment (charges 1, 3 and 5);
- Three charges of using a false document contrary to s 83A(2) of the *Crimes Act* 1958, which carries a maximum penalty of 10 years imprisonment (charges 2, 4 and 6);
- Two charges of making a false document contrary to s 83A(1) of the *Crimes Act* 1958, which carries a maximum penalty of 10 years imprisonment (charges 7 and 8); and
- One charge of possess a drug of dependence contrary to s 73 of the *Drugs, Poisons and Controlled Substances Act* 1981, which carries a maximum penalty of 1 year imprisonment (charge 9).

2 You have also admitted you prior Criminal Record.

Circumstances of the offending

3 A prosecution opening was tendered on the plea and may be summarised as follows:

4 On 3 October 2007, you Fidaa Ahmad signed a contract with the Westpac Bank for a loan of $150,000 to purchase land located at 86 Kirkham Drive, Greenvale, Victoria.

5 As part of the application process to Westpac, you declared:

- that you were earning $54,080 in gross annual income and paid $10,824 in tax;
- that you had a base monthly income of $3,537; and
- that you were an employee of J & M Kheir Builders Pty Ltd.

6 You provided two payslips allegedly from J & M Kheir Builders Pty Ltd dated 6 September 2007 and 13 September 2007. These payslips indicated respectively that you were paid $1,254.50 per week and $1,287 per week, before tax. It is these facts that relate to charge 2, use a false document.

7 There is no record of your employment with J & M Kheir Builders Pty Ltd or with the Australian Tax Office.

8 The owner of J & M Kheir Builders Pty Ltd, Victor Kheir, states that you had never worked for J & M Kheir Builders Pty Ltd and that the payslips provided by you are not genuine and had not come from that business.

9 The last tax return completed by you was for the financial year 2007-2008. In this financial year, you declared an income of $15,524 of salary/wages from Fidaa's Transport Pty Ltd and another $5,519 of Australian Government allowances (Newstart). None of these payments were declared by you when applying for the loan with Westpac.

10 In a Westpac Bank document titled ‘Loan Application’ and signed by you on 14 July 2007, you stated that you were a skilled labourer for J & M Kheir Builders Pty Ltd earning $65,000 annually. You confirmed ‘that the information contained in the application and the financial information supporting it are in all respects complete and correct. I acknowledge that the Lender will rely on this information when making its decision.’

11 In a Westpac Bank document titled Personal Finance Application and signed by you on 3 October 2007, again you confirmed ‘that the information contained in the application and the financial information supporting it are in all respects complete and correct. I acknowledge that the Lender will rely on this information when making its decision.’ The loan was granted. It is these facts that relate to charge 1, obtain financial advantage by deception.

12 In October 2008, you transferred the Westpac Bank loan repayments to the Commonwealth Bank via subsidiary lending firm, Colonial. You used mortgage broker firm, Mortgage Australia Group, to obtain $152,388 from the Commonwealth Bank.

13 In the loan application, you stated that you worked for J & M Kheir Builders Pty Ltd and that your annual gross salary/wages was $78,062.

14 In October 2008, with the land loan now transferred, you used Mortgage Australia Group to obtain a second loan from the Commonwealth Bank to build a house on 86 Kirkham Drive, Greenvale. With a deposit of $11,929.30 by you and using the first home owners grant of $12,000, you obtained $228,566 from the Commonwealth Bank.

15 In this second application, you stated that you worked for J & M Kheir Builders Pty Ltd, and had an annual gross salary/wages of $78,000.

16 In order to support the application, you provided two payslips allegedly from J & M Kheir Builders Pty Ltd from 28 August to 4 September 2008 and 4 September to 11 September 2008 indicating you were paid $1,501.20 per week, before tax. It is these facts that relate to charge 4, use a false document.

17 As was the case in relation to charges 1 and 2, the owner of J & M Kheir Builders Pty Ltd, Victor Kheir states that you had never worked for J & M Kheir Builders Pty Ltd and that the payslips provided by you are not genuine and had not come from that business.

18 Mortgage broker Omir Abdul-Wahed, owner of Mortgage Australia Group (Brunswick Office), states that he used the payslips provided by you to process the loan application and would not have processed the application if he knew the documents were false.

19 Commonwealth/Colonial would have relied on these payslips in determining the loan

approval. It is these facts that relate to charge 3, obtain financial advantage by deception.

20 With finance secured, you subsequently built a four-bedroom house on the land.

21 In November 2012, you applied to re-mortgage the house and land at 86 Kirkham Drive, Greenvale through the Westpac Bank. You still owed the Commonwealth Bank $357,000 and this amount was retained to pay out or discharge the Commonwealth Bank loan.

22 You did not live at the property and had the property leased at $1,820 per calendar month through Raine and Horne, Roxburgh Park. This income was not declared to the Australian Tax Office.

23 On the loan application form to Westpac, you stated:

- that from 14 April 2011, you were a personal secretary/assistant for Abou-Eid Nominees of 83 Coburg Road, Coburg;
- that from 7 August 2006 to 28 March 2011, you were a carpenter for J & M Kheir Builders Pty Ltd;
- that your base monthly net income (after tax) was $3,679 and that you received an additional $1,820 in rental payments for a combined income of $5,499 per month;
- that there was no co-applicant on the loan; and
- that your monthly repayments to the Commonwealth Bank were $2,357 per month.

24 You used a mortgage broker, Fatih Deniz, from BMG Mortgage & Finance Brokers Pty Ltd to facilitate the re-financing. As part of the approval process, you provided documents to the broker to provide evidence of current and previous employment.

25 These documents consisted of:

- a PAYG payment summary addressed to you for the year ending 30 June 2012. It

stated that you earned $48,527 for the 2011-2012 financial year. This document stated the payer was authorised person Khalid Abou-Eid, of Abou-Eid Nominees; and

- a payslip addressed to you from employer Abou-Eid Nominees for a pay period of between 28 October 2012 and 4 November 2012. The payslip claimed you were paid $1,040 per week before tax.

26 Khalid Abou-Eid, the director of Abou-Eid Nominees and Apogee Financial Planning, states that the PAYG summary and payslip are false and had not been provided or produced by him or anyone under his authority. It is these facts that relate to charge 6, use a false document.

27 Mr Abou-Eid stated that you were known to him as you were to be paid on a commission basis if clients were successfully referred to him for life insurance and superannuation products. You did not successfully introduce any clients to the business, therefore no income was paid.

28 Mortgage Broker Fatih Deniz, director of BMG Mortgage & Finance Brokers Pty Ltd, states he used the PAYG summary and payslip provided by you to process the loan application and that he would not have processed the application if he knew the documents were false. Mr Deniz also stated that Westpac would have relied on this payslip and summary in determining the loan approval.

29 In the Westpac loan application form signed by you on 16 November 2012, you acknowledged ‘that the information contained in the application and the financial information supporting it are in all respects complete and correct. I acknowledge that the Lender will rely on this information when making its decision.’

30 You obtained a loan of $428,000 from the Westpac Bank. It is these facts that relate to charge 5, obtain financial advantage by deception.

31 As part of the investigation, police lawfully intercepted phone calls and Short

Message Service (SMS) belonging to two mobile phones linked to you. One of the mobile phones was registered in the name of Sarah Thom, your then partner, now wife. The second mobile phone was registered in the name of Ben Smith and your home address.

32 On 31 March 2016, police executed a search warrant at your home address. Police located two letters in the glove box of a 2012 Mercedes sedan, which was registered to you. The keys to the vehicle were located in your bedroom. These letters were located with other documents in your name.

33 The first letter was on a Kenyon & Ahmet Lawyers letterhead dated 14 September 2015 stating Just Car Insurance have agreed to pay you $104,000 in relation to a Motor Claim settlement. The document is unsigned and allegedly written by Narelle Ahmet. This letter was false. It is these facts that relate to charge 7, making a false document.

34 In a series of lawfully intercepted phone calls and SMSs on 14 September 2015, you direct Ms Thom to write the above letter. You suggested using Kenyon Lawyers and Ms Thom states that she could go to their website and use their letterhead. In one SMS, Ms Thom wrote to you saying ‘But don't tell no1 I did coz it fraud! Lol’. You stated that the letter was to show to a person named ‘Kenny’. You said you needed to ‘have (the letter) to show him something’.

35 The second letter was a document on a Victoria Police letterhead dated 9 October 2015 stating that $190,000 was seized from you on 3 October 2015. The document was allegedly written by Leading Senior Detective Michael Taylor, Fraud and Laundering Division, Police - Brunswick LAC. The document is unsigned and was false. It is these facts that relate to charge 8, making a false document.

36 In a series of lawfully intercepted phone calls and SMSs on 8 and 9 October 2015, you direct Ms Thom to write this letter. In one SMS, Ms Thom wrote ‘It actually made me nervous I'd get done for fraud!! Lol’. This letter was written to indicate to your

associate, Walid Taleb, that you were to receive a large amount of money from Victoria Police.

37 During the search warrant on 31 March 2016, police located four vials of a liquid nominated as Testocor on its label in the bedroom used by you. Testocor is a steroid that boosts testosterone levels and requires a prescription. You were not prescribed the steroid and provided no lawful justification for possessing that drug. It is these facts that relate to charge 9, possession of a drug of dependence.

38 You were interviewed by police on 16 September 2016 and made a no comment interview.

Objective seriousness of the offence

39 Mr Anderson who appeared on your behalf, submitted that for a number of reasons the objective seriousness of your offending is not at the high end.

40 In relation to counts 1 to 6, it was submitted that these offences are related. As to each of those offences the finance sought to be obtained related to the purchase and development of the land at 86 Kirkham Drive, Greenvale. The original loan obtained from Westpac Bank in relation to charges 1 and 2 was used for the purchase of the land at Kirkham Drive. Charges 3 and 4 related to the obtaining of funds from the Commonwealth Bank to discharge the original loan and to seek further funds in order to build a four bedroom house on the land. Charges 5 and 6 related to further refinancing the loan through Westpac.

41 It was put that the loans were taken out and secured against mortgages over real property. Thus, in the event of a default, the banks would have been in the same position to avoid loss as they would in the normal circumstances of mortgaging assets. It was put therefore that the banks were not at risk of any financial loss.

42 It was further submitted that the monies loaned to you were used for the purposes for which they were sought, that is the purchase of land and the building of a house on

that land. Further, once the loans had been obtained, there was no defaulting on the loans and they were serviced as required by the terms and conditions of them.

43 Upon detection of the offence and before charges were laid, you paid out the outstanding amount of the loan in the order of some $400,000. As such there was no actual loss to the banks in this instance.

44 In cases such as this the financial loss suffered by any victim or the potential for financial loss are relevant factors in assessing objective seriousness. In *DPP v Kose*[1] the facts were very similar to the facts in this case where the respondent had obtained home loans using false information. He had paid back the loans in full including payments of interests and costs. Similar to the circumstances in this case, there was no financial loss to the banks. There Chief Justice Warren said:

> …the fact that the respondent intended at every stage to repay the loans, evince the limited extent to which the respondent was willing to expose his victims to the risk of an unwarranted loss. This goes squarely to the culpability of his deception.[2]

45 Mr Devlin, who appeared on behalf of the Director of Public Prosecutions, submitted that the offending is serious. With reference to established authorities, he submitted that in relation to this type of offending, general deterrence and denunciation are important sentencing considerations. He furthered referred to the sentence of Chief Justice Rozenes (as he then was) of this court in the sentence of *DPP v Nguyen*[3] where he said:

> Financial institutions should be entitled to rely upon representations made to them. Conduct of this kind is serious and impacts upon the community by way of making it more difficult for people to obtain finance and possibly at a higher cost. These offences are also difficult to detect. Persons in the financial community and would-be borrowers should understand that an offence of this kind will not be treated leniently by the courts and may, in appropriate circumstances, result in a sentence of imprisonment. General deterrence must necessarily play an important role in the sentencing process.[4]

1 [2006] VSCA 119.
2 At [12].
3 [2014] VCC 125.
4 At [13].

46 In *R v Tran*[5], the bank employee in that instance processed home loans using false information effectively overstating the income of the borrowers. In that case the appellant's motive was to obtain commissions as a result of securing home loans. The total value of the borrowings was some $4.2 million. Further, none of the borrowers had defaulted on the loans. Justice Nettle noted as a relevant sentencing fact that the bank did not sustain any loss as a result of the offences primarily because the loans were fully secured by mortgage.[6]

47 In this case, while there was an intention to deceive the various financial institutions, there was no intention to cause financial loss. The monies obtained by you were used for the purposes for which they were obtained, that is, to purchase land and then to build a house on that land.

48 However, the offending in relation to charges 1 to 6 occurred over a sustained period from September 2007 until December 2012. It involved three instances of you providing false information in order to obtain financial advantage in each case increasing the risk to the banks. In my view in all the circumstances your behaviour was a brazen example of offences of this nature and while not at the high end, is still a serious example of obtaining financial advantage by deception.

49 As to charges 7 and 8, while that offending is unrelated to charges 1 to 6, in my view they are offences that are relatively serious examples of making a false document.

Personal circumstances

50 You are 33 years of age. You reside with your wife of two years and you have a daughter who is eight months of age.

51 You are the middle child of seven children. You have three sisters and three brothers. Your three brothers all work in the construction industry. None of your siblings have a criminal history.

5 [2014] VSCA 85.
6 At [28].

52 You attended Brunswick Secondary College until year 10. You then commenced a plastering apprenticeship which you did not finish. You have been involved in varied employment including as a landscaper and as a baker.

53 You were a talented football player and from ages 17 to 18 you played with the Northern Reserves. You then played with Carlton Football Club in the reserves however due to injury you were unable to continue with that club. You then played with the Northern Saints Football Club.

54 You were very close to your father who actively supported your career in football. In 2006 your father died when you were aged 21. It was at that point your life took a negative turn. You began to suffer periods of depression and anxiety.

55 A letter was tendered from your general practitioner, Dr Anthony Diamantaras. He has been your general practitioner for the past 13 years. He states that you have suffered in the past from severe depression with marked features of anxiety from about 2010. He states that you frequently act impulsively and have had thoughts of self harm in the past. He also says that you have been trialled on a number of antidepressant medication but have had to cease them due to the significant side effects.

56 Your criminal history contains two matters from 2007. One of those matters is relevant as it was a dishonesty offence where you received an adjourned undertaking. The other was a driving matter. While those two matters are formally prior convictions, I was told that also in 2007 you were convicted of robbery where it was said that you were complicit with three other persons involved in a fight where items were taken from one of the victims. You received a suspended sentence in relation to that matter.

Sentencing considerations

57 Mr Anderson submitted that you have not been before the court since 2007. However

I note that in this instance the offending in relation to charges 1 to 6, begins in November 2007 and extends to December 2012. Charges 7 and 8 occurred in 2015.

58 Mr Anderson highlighted a number of matters in mitigation. First and foremost is your plea of guilty which he submitted should be treated as an early plea as the matter was resolved well in advance of a committal hearing. The plea of guilty has avoided the need for a trial and as such it has facilitated the course of justice. I accept the plea in all the circumstances is an early plea.

59 It was also submitted that the evidence of the fact that you had no intention to deprive the bank of money and the fact that you have made full repayment of the loans to the bank, may be used as evidence of remorse. I accept that you have cooperated by repaying the money in order to put this matter behind you, however your insight into the impact of your offending is of some concern. I had you assessed for a community correction order where the writer of the assessment report notes that you lack insight into the impact your offending may have on others. You stated that the banks loaned you the money and further that they would have made money.

60 Mr Anderson submitted that while general deterrence is an important sentencing consideration in these matters, he submitted that the principles may be given less weight in cases where loans were secured by persons with *bona fide* intentions of servicing those loans.

61 As for specific deterrence, in my view given your limited insight into this offending, together with the fact that you have relevant prior history, specific deterrence must carry weight in the sentencing discretion.

62 Mr Devlin highlighted that the offence is serious in that although the banks did not sustain any actual loss, there was a real risk to the banks as a result of the deceptions. He further noted that as the loans were increased over the period of charges 1 to 6, the risk also was increased.

63 Turning to your prospects of rehabilitation, Mr Anderson highlighted the fact that you have not been before the court since 2007. Further, the offending in relation to charges 1 to 6 occurred between 2007 and 2012. In that time you continued to repay the loans and live a life without crime. You have also recently settled down in that you have married and now have an eight month old child. As such, in my view despite your relative lack of insight into your offending, I assess your prospects of rehabilitation as positive.

64 In this instance, in relation to charges 1 to 6, it was submitted that because of the timeframe in which they occurred, a suspended sentence is an available and appropriate sentencing option. I agree. As was noted by Nettle JA in *R v Glenn:*[7]

> The imposition of a suspended sentence provided an appropriate means of avoiding an immediate term of imprisonment, while at the same time giving effect to the principle objective of rehabilitation and satisfying the perceived need for deterrence and denunciation.

65 As noted, I also had you assessed for a community corrections order. In the assessment report the writer notes that you would benefit from offence specific programs to reduce the risk of reoffending. Given your limited insight in relation to the offending, in my view that would be an appropriate condition of any community correction order.

66 Finally it was submitted that charges 1 to 6 are highly related in that the finance was obtained in each instance in relation to the one property at 86 Kirkham Drive, Greenvale. As such a high degree of concurrency should be afforded between those charges. I agree.

Sentence

67 Mr Ahmad please stand.

[7] [2005] VSCA 31 at [15].

68 Fidaa Ahmad, in relation to charges 1, 2, 3, 4, 5 and 6, you will be convicted and sentenced to 8 months imprisonment on each charge.

69 I direct that 2 months of charges 3 and 5 be served cumulatively on each other and on charge 1. That makes for a total effective sentence of 12 months imprisonment. That sentence will be wholly suspended for a period of 2 years.

70 On charges 7 and 8 you will be convicted and placed on a community correction order for a period of two years.

71 You will be required to complete 150 hours community work. You will be subject to supervision and there will also be an offence specific program to reduce the risk of reoffending.

72 Although it was recommended that a mental health treatment condition be part of any order, in my view you have adequate support in this area as a result of the long term relationship you have with your general practitioner. Further, there was no connection between your mental health issues and the offending.

73 Pursuant to s 48CA of the *Sentencing Act* 1991, I direct that all of the hours that you satisfactorily complete pursuant to the offence specific program condition may be credited as hours of unpaid community work.

74 As to charge 9, possession of a drug of dependence namely steroid, you will be convicted and fined $250.

75 Pursuant to s 6AAA of the *Sentencing Act* 1991, if not for your plea of guilty I would have sentenced you to a period of 18 months imprisonment with a non-parole period of 12 months.

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